No. 90-1060

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT A. HOLLIDAY,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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January 25, 1991

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does the Federal Employers' Liability Act ("F.E.L.A.") recognize a cause of action for stress arising from the requirement that one learn and qualify for a new job?
2. May a cause of action be maintained for negligent infliction of emotional distress when there has been no accident or injury to the petitioner or anyone else?

PARTIES TO THE PROCEEDING

Petitioner, Robert A. Holliday, was the plaintiff in the District Court and the appellant in the Court of Appeals. Respondent, Consolidated Rail Corporation, was the defendant in the District Court and the appellee in the Court of Appeals.

Respondent has no parent corporation(s). It has the following affiliates and non-wholly-owned subsidiaries:

The Akron and Barberton Belt Railroad Company

Albany Port Railroad Company

The Belt Railway Company of Chicago

Calumet Western Railway Company

Chicago and Western Indiana Railroad Company

Indiana Harbor Belt Railroad Company

The Lakefront Dock and Railroad Terminal Company

Nicholas, Fayette and Greenbrier Railroad Company

Peoria and Pekin Union Railway Company

Pittsburgh, Chartiers and Youghiogheny Railway Company

Railroad Association Insurance, Limited

Trailer Train Company

Transportation Data Exchange, Incorporated

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Consolidated Rail Corporation, respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Third Circuit entered on September 14, 1990.

COUNTERSTATEMENT OF THE CASE

Robert A. Holliday ("Holliday") was hired by Consolidated Rail Corporation ("Conrail") in 1979, to work as a brakeman in the Allentown, Pennsylvania area. Within a year, he was promoted to the position of yard conductor. In 1980, Holliday

was furloughed. He was not recalled to work by Conrail until 1986, when he was assigned to Conrail's Oak Island facility in the New Jersey Division and worked from a combined conductor and brakeman list.

Conductors and brakemen are both trainmen who perform such tasks as coupling and uncoupling railroad cars, throwing track switches, watching for signals and observing conditions at railroad grade crossings. The conductor is in charge of the train and is responsible for the satisfactory completion of the assigned tasks of the crew. To become a conductor, an employee, after satisfactory performance as a brakeman, must acquire and demonstrate familiarity with the physical characteristics of the railroad, including the location of the tracks, signals, switches and sidings. Also required is knowledge of the operating rules applicable to the portion of the road over which the train will run. To qualify on a particular railroad line, a conductor can ride trains as an observer, work as a brakeman or apprentice under the supervision of an experienced pilot.

On October 14, 1987, a train dispatcher told Holliday that he was being held out of service until he was qualified as a road conductor. Because Holliday already had worked for over a year as a brakeman in this area, all he had to do to qualify as a road conductor was to demonstrate to a rules examiner or road foreman that he was familiar with the physical characteristics of the railroad. Shortly after he was taken out of service, the United Transportation Union arranged with Conrail to give Holliday ten days in which to qualify for the position, beginning on October 28. Between October 28 and 31, Holliday trained for the position under the supervision of a pilot on assignment WJPR32. Holliday worked the same assignment but without a pilot, on November 3, 4, 5 and 9. Nothing unusual occurred during the days that Holliday worked as the road conductor on WPJR32. (Respondent's Appendix at 1b-5b.) Conrail took Holliday out of service on November 10, because he had not gone to a road foreman or rules examiner to be formally qualified within the prescribed ten day limit.

During the time in which he was training as a conductor, Holliday alleges that he suffered from anxiety in the form of

heart palpatations, sleep disorders, spastic colon, tenesmus and involuntary rectal discharge. The source of Holliday's anxiety stemmed from the occasions that he worked on assignment WJPR32 without the guidance of a pilot. Holliday's thoughts were constantly preoccupied with work and what would happen if there were an accident because he feared that he would be held responsible.

On appeal, Holliday raises the claim that he was placed in a "zone of danger" because Conrail sent him out on job assignments that he was unqualified to perform. The only indication that Holliday may have been placed in danger comes from his hand-written notes. He noted in the entry for November 4, 1987, that while working on assignment WJPR32:

> My mind is not on what it should be. I almost got crushed while working on trk. #9 at Bakelite. Pressure was b[u]ilding up on me, at that time[.] I was thro[w]ing wrong switches, and I should have known better.

However, when Holliday was questioned specifically about this day, he did not even mention this event, nor did he identify this episode as the cause of his anxiety or stress. (Respondent's Appendix at 1b-6b.)

SUMMARY OF REASONS FOR DENYING THE WRIT

The petition for Writ of Certiorari should be denied because both the District Court and Court of Appeals for the Third Circuit properly granted summary judgment on the issue of negligent infliction of emotional distress. After reviewing the facts, these courts applied the appropriate legal standards. Contrary to the assertions of Petitioner, there is no conflict among the courts as to what constitutes negligent infliction of emotional distress from being placed within a zone of danger. Moreover, the holding of the Court of Appeals for the Third Circuit is narrow, applying only to the facts of this case. Therefore, there are no special or important reasons for granting certiorari. The Petition seeks only to have the Court review the record previously presented. Such a request does not warrant the exercise of the Court's discretionary power of review.

REASONS FOR DENYING THE WRIT

A. Both The District Court And The Court of Appeals Followed Legally Established Guidelines In Assessing This Claim For Emotional Distress Under The F.E.L.A.

The F.E.L.A. is a federal negligence statute which applies to the railroad industry. 45 U.S.C. §§51-60. Liability is not absolute. *Brady v. Southern Ry.*, 320 U.S. 476, 483-84 (1943); *Inman v. Baltimore & O. R.R.*, 361 U.S. 138, 140 (1959). The Court provided guidelines to be followed in dealing with claims for emotional distress under the F.E.L.A. in *Atchison, T. & S.F. Ry. v. Buell,* 480 U.S. 557 (1987). In assessing the viability of claims for emotional distress, the Court stressed the importance of developing a full record on the exact nature of the injury and the character of the tortious activity. *Id.* at 568. Once the record has been developed, the appropriate legal principles based on "common-law concepts for negligence and injury", *Urie v. Thompson*, 337 U.S. 163, 182 (1949), are to be applied to the particular facts at hand. *Atchison, T. & S.F. Ry. v. Buell,* 480 U.S. at 570. This is exactly what the District Court and the Court of Appeals have done in this case. Each court based its opinion on a full and complete record. (Petitioner's Appendix at A7-8, 25.) Accordingly, they were able to make an exacting scrutiny of the facts of the case and apply the appropriate law.

B. It Is The General Consensus Of The Courts That There Can Be No Recovery For Negligent Infliction Of Emotional Distress Without Some Precipitating Physical Injury Or Accident

Courts dealing with the issue of negligent infliction of emotional distress, under the F.E.L.A., have uniformly held that there must be some precipitating physical injury or accident to allow recovery. *See Finn v. Consolidated Rail Corp.*, 622 F. Supp. 41 (D. Mass. 1985), *aff'd on other grounds,* 782 F.2d 13 (1st Cir. 1986); *Moody v. Maine Central R.R.*, 620 F. Supp. 1472 (D. Me. 1985), *aff'd on other grounds,* 823 F.2d 693 (1st Cir. 1987); *Moody v. Boston & M.*, 1990 WL 8115 (D. Mass.),

aff'd, ____F.2d ____, 1990 WL 192957 (1st Cir. 1990); *Kraus v. Consolidated Rail Corp.*, 723 F. Supp. 1073 (E.D. Pa. 1989), *appeal dismissed*, 899 F.2d 1360 (3d Cir. 1990); *Gaston v. Flowers Transp.*, 675 F. Supp. 1036 (E.D. La. 1987), *aff'd*, 866 F.2d 816 (5th Cir. 1989); *Lancaster v. Norfolk & W. R.R.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987); *Gillman v. Burlington N. R.R.*, 673 F. Supp. 913 (N.D. Ill. 1987), *aff'd*, 878 F.2d 1020 (7th Cir. 1989); *Amendola v. Kansas City S. Ry.*, 699 F. Supp. 1401 (W.D. Mo. 1988).

Petitioner, in a question presented to the Court, states that this case deals with an employee who was not involved in an accident or subject to any impact. (Petitioner's Questions Presented.) When Holliday was specifically asked during his deposition what caused his fear, he responded: "I was afraid that during the course of those times that I worked at PR32 that if *we were* to have an accident of any type that I would be held responsible." (Emphasis added.) (Respondent's Appendix at 5b.) The only contention that the cause of Holliday's fear was imminent impact is the unsubstantiated claim made in his trial and appellate briefs. The Court has held that such unsubstantiated claims are not sufficient to defeat a motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The basis of Holliday's claim is distinquishable from *Fletcher v. Union Pac. R.R.*, 467 F. Supp. 61 (D. Neb. 1979), *rev'd in part*, 621 F.2d 902 (8th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981), since it was not the result of being asked to do a job beyond his "physical capacity to perform with reasonable safety." *Id.* at 906. Rather, it was the result of being asked to qualify and work as a conductor, a position that Holliday had previously held in the Allentown Yard.

Because the record in this case is devoid of any accident or injury to Holliday or anyone else, Petitioner cannot sustain a claim for negligent infliction of emotional distress.

C. There Is No Conflict Among The Courts, That Have Addressed The Issue, As To What Constitutes Negligent Infliction Of Emotional Distress From Being Placed In A Zone of Danger

Only 17 states have allowed recovery for claims of negligent infliction of emotional distress as a result of being placed in a "zone of danger." *Kraus v. Consolidated Rail Corp.*, 723 F. Supp. at 1089. Even if credence were given to Petitioner's assertion that he was placed in the zone of danger, he has not met the common law requirements to sustain this cause of action.

The cases that have specifically applied the zone of danger concept to the F.E.L.A. have uniformly adopted the following principles: 1) the individual must have been in a zone of danger (high risk of physical injury from defendant's negligent act); 2) the individual must have felt contemporaneous fear for his safety; and 3) the individual must show some physical injury or illness as a result of his emotional distress. *Gillman v. Burlington N. R.R.*, 878 F.2d at 1024; *Outten v. National R.R. Pass. Corp.*, No. 88-3347, slip op. at 7 (E.D. Pa. June 13, 1990); *See also Angst v. Great Northern Ry.*, 131 F. Supp. 156 (D. Minn. 1955); *Beanland v. Chicago R. I. & Pac. R.R.*, 345 F. Supp. 220 (W.D. Ma. 1972), *rev'd*, 480 F.2d 109 (8th Cir. 1973); *Gaston v. Flowers Transp., supra.* Both the District Court and Court of Appeals applying these principles held that Holliday failed to meet his burden and granted summary judgment.

The cases cited by Petitioner as conflicting with the holding of the Court of Appeals do not deal with claims for negligent infliction of emotional distress from being placed in a zone of danger. *Taylor* and *Lancaster* are cases involving a supervisor assaulting an employee.[1] *Yawn* dealt with clerical workers who claimed that they were overworked as a result of being understaffed.[2] Finally, *Lewy* involved the claim of an employee

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1. *Taylor v. Burlington N. R.R.*, 787 F.2d 1309 (9th Cir. 1986); *Lancaster v. Norfolk & W. R.R., supra.*

2. *Yawn v. Southern Ry.*, 591 F.2d 312 (5th Cir. 1979), *cert. denied*, 442 U.S. 934 (1980).

who was discharged for other reasons after he was injured in a locomotive collision.[3] It is clear that these cases do not deal with the same tortious conduct. Therefore, their legal principles cannot provide guidance in determining the issues presented here.

D. The Case Turns On Its Particular Facts And There Are No Special Or Important Reasons For Granting Certiorari

Petitioner, in essence, is asking the Court to review the factual conclusions of the lower courts and to analyze their propriety. Both courts stated that their opinions were narrow and turned on the facts presented. As the Court has consistently held, it does not "grant certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925). The decision in this case is of importance solely to the litigants. There are no special or important reasons favoring the exercise of the Court's discretionary power of review.

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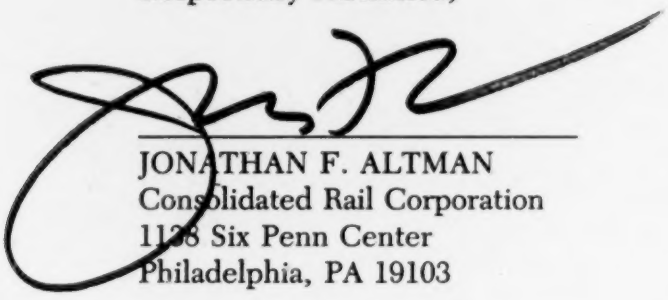
3. *Lewy v. Southern Pac. Transp.*, 799 F.2d 1281 (9th Cir. 1986).

CONCLUSION

For all of the foregoing reasons, Respondent, Consolidated Rail Corporation, respectfully requests that the Petition for Writ of Certiorari of Robert A. Holliday should be denied.

Respectfully submitted,



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January 25, 1991

CERTIFICATION OF SERVICE

I hereby certify that three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari were served on counsel for Petitioner at the address below by United States mail, first-class postage prepaid, on January 25, 1991, pursuant to Supreme Court Rule of Procedure 29.3:

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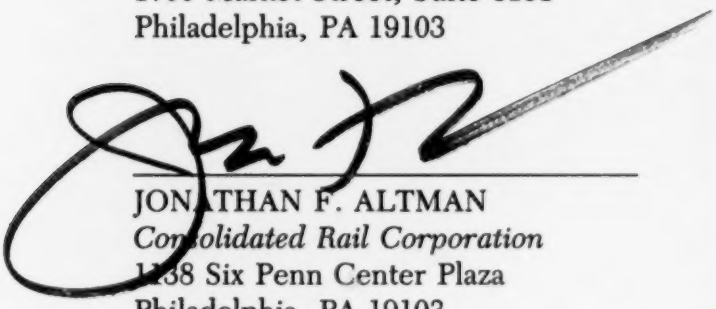

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APPENDIX TO
BRIEF OF RESPONDENT IN OPPOSITION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 88-6437

ROBERT A. HOLLIDAY
vs.
CONSOLIDATED RAIL CORPORATION

Oral deposition of ROBERT A. HOLLIDAY, pursuant to the Federal Rules of Civil Procedure, held in the Legal Department of Consolidated Rail Corporation, 6 Penn Center Plaza, Suite 1138, Philadelphia, Pennsylvania, on Wednesday, December 21, 1988, commencing at 2:45 p.m., before David Lerman, Registered Professional Reporter - Notary Public.

APPEARANCES:

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* * * *

BY MR. SCHWARTZ:

Q. What happened when you were called again for the job, the WJPR 32?

THE WITNESS: What day are we talking about, sir?

MR. SCHWARTZ: The 3rd, that was the next time you were called.

A. On November the 3rd, called again for the WJPR 32. When I got to Port Reading I was told I had no pilot. The yardmaster had a message for me to call a Mr. Hoffman.

Q. Who was Mr. Hoffman?

A. I really don't know, sir. He didn't say. He said, "Call Mr. Hoffman."

I called, but he was in a meeting and after about a half an hour we were waiting around the yardmaster's office there, in the office, and Mr. Kuiper had called me to tell me not to worry about conducting the job, that the customers had to be serviced and he would take responsibility if we went on the ground.

Q. What does that mean?

A. If the train went on the ground.

Q. Derailed?

A. Derailed for some unknown reason, if we went on the ground, and that the engineer was qualified for all of the crossings.

At that point I had no choice, I could not refuse the job.

Q. Well, couldn't you tell him you were not qualified?

A. I told them and they knew.

Q. Did you consider yourself to be not qualified for, that job?

A. I hadn't worked the job that much to be qualified, no.

Q. How much time would you have had to work it before you would consider yourself qualified?

THE WITNESS: Daylight or night?

MR. SCHWARTZ: Either way, whichever you like.

A. I'm not sure, sir, because I don't really know that whole area. There are a number of industries back there that we never even got to.

Q. Was this a night job?

A. Always.

Q. So after Mr. Kuiper told you not to worry about it you then accepted the assignment?

A. Reluctantly. It was either work or not work.

Q. And you were to serve as the conductor on this job; is that correct?

A. That's correct, sir.

Q. Did you work the job?

A. I did.

Q. Did the train go on the ground?

A. No, sir.

Q. Now, according to your notes here you were called, for the same job again the next day?

A. That's correct.

Q. Did you work it?

A. Yes, I did work it.

Q. And the train did not go on the ground then either, did it?

A. No, sir.

Q. Did you work the job again on the 5th?

A. I believe I did, yes, sir.

Q. So then by that time you had now worked that job four times within approximately one week period?

A. That's correct, sir, at night.

Q. Did you then consider yourself to be qualified on that job?

A. No, sir.

Q. Did you discuss with the crew dispatcher when he called you on the 5th and say, "Hey, what are you guys doing?"

A. I did.

Q. What did he tell you?

A. He told me that was the job I fell in line for.

Q. Is that the phrase that he used, that's the job you fell in line for?

A. Something to that effect, sir.

Q. Were you called again for that job after the 5th?

A. I was called again on the 6th. I called to see what job I would be going out on because I periodically did call to see what was in line.

Q. Did they tell you that's what the job was going to be?

A. They told me the WJPR 32 and they also told me at that time that the engineer and brakeman had marked off. I reminded them again that I was not qualified.

He said he understood and he took me on with Mr. VonHolten.

Q. Well, let me interrupt you for a minute, Mr. Holliday. When you had worked the job the previous four or five days, were you working with the same engineer and brakeman every night?

A. I believe during that period the engineer had taken off one night. I believe.

Q. Was the extra engineer qualified, to your knowledge?

A. Evidently, to my knowledge he was, sure. I believe the regular engineer had taken off, but I'm not really certain on that.

Q. So now on the 6th, when you called the dispatcher you said he put you on with VonHolten. What did VonHolten do or say?

A. I told Mr. VonHolten the same thing.

He told me he would call me back and that was early in the afternoon. That was approximately eleven o'clock in the morning because the job started, I think three or something, and that he would call me back, and he never called me back.

Q. What's the next job that you did work?

A. The BB 91 as a conductor with a pilot.

Q. Is that Bound Brook?

A. Yes, I believe it was, sir.

Q. So that would give you an opportunity to qualify on that one also; is that right?

A. That would give me an opportunity to get over that section of the Railroad, one trip.

Q. Had you ever worked that job or a similar job previously?

A. Possibly a similar. I don't know if it was the exact same job.

Q. And you worked that job with a pilot?

A. With a pilot, yes, sir.

Q. What was the next job you worked after that?

A. PR 32.

Q. When did you work it?

A. 11-9-87.

Q. And you were a conductor on that job again?

A. They called me to conduct, but no pilot.

Q. Did you protest at all?

A. I did.

Q. What were you told?

A. I was told by the crew dispatcher that I was out of service until I qualified over the whole territory.

Q. So when they called you on the 9th to work that job did you say, "I'm not working it"?

A. I never refused a job, sir.

Q. Well, what happened then? They called you on the 9th to work the job. Did you work the job on the 9th?

A. I don't believe I did. I don't recall, sir.

Q. Then according to the entry here, the next day when you marked up you were told you were out of service?

A. I think it was two o'clock in the morning when I went to mark back up, I believe I was coming off another job, I was calling in to mark up and I was told I was out of service again.

Q. Did you ask to speak to Mr. VonHolten?

A. Not at that time, no, not at that time of the morning, no, sir.

Q. Did you make an attempt to speak to him again after that?

A. Not at that time, sir, no.

Q. Mr. Holliday, how did you feel about working this job or these jobs for which you felt unqualified?

A. Extremely uneasy, extremely nervous, not sure of myself on that particular job.

Q. What were you uneasy and nervous about?

A. About not knowing the territory.

Q. Did you work again after being taken out of service?

A. I worked two jobs sometime later, yes.

Q. Do you remember when?

A. I believe it was sometime in April.

Q. Did you work again in 1987?

A. No, sir.

* * * *

Q. What did you express to him as being your problem?

A. Very afraid, scared, nervous, extreme uncertainty.

Q. What were you afraid of, what were you scared of?

A. I was afraid that during the course of those times that I worked at PR 32 that if we were to have an accident of any type that I would be held responsible.

Q. What did Dr. Turoczi suggest as far as treatment was concerned?

THE WITNESS: As far as treatment?

MR. SCHWARTZ: Yes.

A. He prescribed walks, he prescribed trying not to think about the Railroad, relaxation. Mostly, I think, relaxation and try not to think about it, to divert my thoughts to other things.

Q. Did Dr. Turoczi suggest any medication for you?

A. No, sir.

Q. Had Dr. Ellsweig suggested any?

A. Dr. Ellsweig had me on medication.

Q. What kind of medication?

A. I think I was on two or three types, I don't recall the names, Xanax was one, I remember Xanax, that's easy to say. The other ones, sir, I don't recall the names.